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Supreme Court of the United States

OCTOBER TERM, 1944

NO. 1029.

MARYLAND CASUALTY COMPANY,
Petitioner,

v.

COUNTY OF ALLEGHENY, a Political Subdivision of the Commonwealth of Pennsylvania.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now County of Allegheny, respondent, by counsel, and files its Brief in opposition to the petition for writ of certiorari herein, as follows:

COUNTER-STATEMENT OF THE MATTER INVOLVED.

Note: References designated by the letter "R" are to pages of the "Appendix to Brief for Appellant." Those designated by the letters "A.P." are to pages of the printed Additional Proceedings in the court below.

The action was laid upon a bond conditioned for faithful performance of a contract. By its complaint (R. 3), respondent alleged default of the bond by three different varieties of breaches of performance of the

contract and claimed damages suffered by the alleged default in a single sum as consequential to any one of the alleged breaches of performance or to all of them together. By its answer (R. 62), petitioner set up an affirmative defense of *res judicata* as to the first two varieties of alleged breaches of performance and denied the third alleged breach of performance. By order of the trial court (R. 78), respondent filed a reply (R. 79) to said *res judicata* defense. The issues created by the pleadings were tried by jury and resulted in a general verdict for respondent (R. 1806). Thereafter, the trial court entered judgment *n.o.v.* for petitioner (R. 2188) upon a determination, as a matter of law, (a) that the first two varieties of alleged breaches of performance were *res judicata,* and (b) that the verdict was without sufficient support as one rendered in respect of the third alleged breach of performance.

The issues raised by the pleadings in respect to the *res judicata* defense were the following: (1) an issue of law as to whether the case relied upon was adjudicated upon the merits of the issues therein involved; (2) a mixed issue of law and fact as to whether respondent was a party, nominal or real, to the proceedings in the case relied upon; (3) an issue of fact as to whether respondent's rights in respect of the issues tendered in the instant action had matured prior to the proceedings in the case relied upon and could have been adjudicated therein.

Respondent appealed (R. 2193) to the Circuit Court below from the judgment *n.o.v.* By its statement of points relied upon (R. 2193-4), respondent attacked the appealed judgment as error upon the grounds: (1) that the branches of respondent's claim based upon the first

two varieties of alleged breaches of performance were not *res judicata* by the evidence touching the case relied upon; (2) that the verdict found legally sufficient evidentiary support as one rendered in respect of the third alleged breach of performance; and (3) that the entry of the appealed judgment was not within the power of the trial court in the procedural circumstances of the record, which showed no motion for a directed verdict in respect of the third alleged breach of performance.

The Court below reversed the appealed judgment (A.P. 58). Its opinion (A.P. 48-57) deals only with the *first* ground of respondent's attack thereagainst above stated. It does not in any way dispose of the *other two* grounds of attack. The opinion discloses (A.P. 50) a complete comprehension by the Court of the above stated issues raised by the pleadings as regards the *res judicata* defense. However, the Court found it necessary to deal with only one of those issues, i.e., the question of law as to whether the case relied upon by petitioner as *res judicata* was decided upon the merits of the issues therein involved. The Court ruled that question of law against petitioner. At the close of its opinion (A.P. 57), the Court expressly stated that its ruling on said question of law rendered unnecessary any consideration of respondent's "other points on the question of *res judicata*". These other points were that the *res judicata* issues (2) and (3) above mentioned had been determined by the verdict, which was binding upon the trial judge (*Berry v. United States*, 312 U. S. 450). (The opinion inadvertently omitted to state the non-necessity for consideration of the remaining grounds of respondent's attack upon the appealed judgment independently of the *res judicata* question).

By way of its brief filed in the Court below, petitioner affirmatively introduced into respondent's appeal an argument to the effect that the appealed judgment was supportable, as a matter of law, upon the ground that respondent failed to give petitioner's principal (the party seller in the sales-contract for the faithful performance of which the bond in suit was given) such notice of its breach of warranties (the first and second varieties of breaches of performance alleged by respondent in the instant action) as is required by § 49 of the Pennsylvania Sales Act. In answer thereto, respondent filed a reply brief in the Court below contending (1) that petitioner's liability on the bond in suit is not predicated upon any notice to petitioner's principal under § 49 of the Sales Act, and (2) that if respondent's compliance with § 49 of the Sales Act is a condition precedent to petitioner's liability upon the bond in suit, any question of sufficient compliance was for the jury in the trial court. The Court below made no disposition in its opinion of the point thus affirmatively introduced by petitioner as in support of the appealed judgment. In a petition for rehearing filed below (A.P. 63-84, particularly 68-72), petitioner complained of the failure of the Court to have considered the point. Its said petition for rehearing was denied (A.P. 86).

When the trial court entered the appealed judgment *n.o.v.*, it also granted petitioner a new trial conditionally as an alternative or *succedaneum* in the event of a reversal of the judgment *n.o.v.* (R. 2188). This event, as above stated, has occurred.

ARGUMENT.

I.

Analysis of the Questions Presented and the Reasons Relied On for Allowance of the Writ.

The form of the petition appears to violate Rule 38, par. 2, by combining the questions presented and the reasons relied on rather than by making a separate statement of each as required by the rule.

The *questions presented* appear to be the following:

(1) Whether the ruling below in reversal of the appealed judgment is in conformity with Pennsylvania law in respect to the question of law decided, viz., that the case relied upon for the *res judicata* defense was not adjudicated upon the merits of the issues therein involved.

(2) Whether, in refusing petitioner's application for rehearing, the Court below made a ruling not in conformity with Pennsylvania law as regards petitioner's point that the appealed judgment *n.o.v.* is supportable, as a matter of law, upon the extrinsic ground that respondent failed to comply with the provisions of § 49 of the Pennsylvania Sales Act.

The *reason relied* on for allowance of the writ appears to be that the Court below has decided important questions of Pennsylvania law (viz., the above stated questions) in a way probably in conflict with applicable Pennsylvania decisions.

The argument to follow will be addressed primarily to the reason relied on. It will show that the reason is

not sufficiently substantiated to warrant exercise of the discretionary power of this Court to grant certiorari for consideration of the questions presented. The argument will also show that the questions presented are not *solely* decisive of the rectitude of the appealed judgment *n.o.v.* or of the rectitude of the order below in reversal thereof, but that, on the contrary, any review of the order of reversal below granted by this Court on certiorari would necessarily embrace not only the single point decided below but also all of the other grounds upon which respondent attacked the appealed judgment *n.o.v.* and which were left undecided below.

II.

As applied to the first question presented, the reason relied on is unsubstantiated.

(1) Petitioner's argument discloses a basic misconception of clear Pennsylvania law. It contends that, because Pennsylvania Equity Rule 66 permits an appeal from the refusal of a court *en banc* to change a decree of dismissal entered by a chancellor at the close of a plaintiff's evidence, such an appeal necessarily requires the appellate court to adjudicate the merits of the issues below and that the judgment of the appellate court constitutes such an adjudication. This contention of petitioner *disregards entirely Pennsylvania Equity Rule 13* and its effect in such appeals. The relevant part of said Rule 13 expressly provides as follows:

> "When the court * * * refuses to change a decree of dismissal, * * * it shall file a statement of the reasons for its action."

Consequently, in the appeal provided for by Rule 66, the question involved is the rectitude *of the reasons* stated by the court *en banc* below in support of its action in refusing to change the chancellor's decree of dismissal. Those reasons *may* or *may not* go to the merits of the issues below. In the *Bassett* case, the reason *did not* go to the merits, as is plainly evident by the statement (R. 2093) filed by the court *en banc* in compliance with said Rule 13.

(2) The Circuit Court below in the instant case applied clear Pennsylvania law. A review of the record in the *Bassett* case in the light of indubitable Pennsylvania law applicable to that record at the various stages of importance to the question presented here by petitioner follows:

> The motion for dismissal made when the taxpayer plaintiffs rested was the counterpart of a motion for involuntary nonsuit in an action at law: *Pennsylvania Equity Rule 66.* The only thing before the chancellor in his consideration of that motion was whether plaintiffs' evidence sustained the case made out by the bill: *Gordon v. Gordon,* 277 Pa. 53, 55. When the chancellor decided that motion, he did not make an "adjudication" under Pennsylvania Equity Rule 67 consisting of formal findings of fact, conclusions of law, and decree *nisi;* he merely acted upon the motion and filed an opinion in explanation of his action. His dismissal of the bill did not make the issues in the action *res judicata: Sauber v. Nouskajian,* 286 Pa. 449, 453. The "exceptions" to his order of dismissal were analogous to a motion to remove a nonsuit at law: *Thomas v. Borden,* 222 Pa. 184; *Gordon v. Gordon,*

supra. By filing their "exceptions", the taxpayer plaintiffs submitted the legal sufficiency of their case to the court *en banc* with the same effect as though the defendants had demurred to the evidence: *Altsman v. Kelly*, 336 Pa. 481, 488. The court *en banc* refused to change the chancellor's order of dismissal. When a court *en banc* refuses to change a chancellor's order of dismissal, it is obliged to file a statement of the reasons for its action: *Pennsylvania Equity Rule 13.* The court *en banc* complied with that rule by opinion filed. Examination of that opinion shows conclusively that the court *en banc* in no way whatsoever passed upon the sufficiency of the plaintiffs' evidence in support of their bill, as upon a demurrer by defendants to the evidence, but that it refused to change the chancellor's order of dismissal for the sole reason that the issues in the case before it had become moot by the payment of the money which the bill was brought to prevent. Accordingly, the final decree of dismissal was not entered upon the merits but was entered, as expressly stated by the court *en banc,* solely because any question involving the merits had become moot. And that it was so entered for that reason was expressly recognized by the Supreme Court of Pennsylvania when the appeal from that final decree came before it. The Supreme Court held the decree to have been properly entered for that sole reason. The Supreme Court both affirmed the decree below and dismissed the appeal. The *decree was affirmed* because it was appropriate as within the remaining power of the court below. The *appeal was dismissed* because it had been taken in a fictitious and moot case.

(3) It is clear Pennsylvania law that, when a decree in equity is relied upon as *res judicata* of instant litigation, it is necessary for the trial court to examine the proffered record for the purpose of discovering whether the decree was entered upon the merits or was founded upon a reason not involving the merits: *Moser v. R. R. Co.*, 233 Pa. 259, 270; *Larkins v. Lindsay*, 205 Pa. 534, 535. The error of the trial court in the instant case lay in its failure to apply that rule of Pennsylvania law. The Circuit Court below applied the rule and corrected the error of the trial court. In doing so, the Court below applied clear Pennsylvania law.

(4) The Pennsylvania decisions cited by petitioner in its Brief do not becloud Pennsylvania law. Nor do they support petitioner's contention that the ruling of the Court below is in conflict with applicable Pennsylvania decisions. They are easily disposed of:

(a) The decision in *Central Pa. Lumber Co. v. Carter*, 348 Pa. 429, as clearly shown in the report, is based upon the failure of the appellant therein to have appealed in the prior action from the refusal of the trial court to set aside the nonsuit entered therein. The report is totally silent as to why the trial court in the former action had entered its order of refusal. The Supreme Court therefore had the right to assume, as it quite apparently did, that said order of refusal was entered in the usual course of such proceedings, i.e., *after* a consideration by the trial court of plaintiff's evidence as upon a demurrer thereto by defendant. There is certainly nothing in the report to indicate anything to the contrary. Consequently, petitioner evidences a complete misunderstanding of the cited case.

(b) The report in *Fine v. Soifer,* 288 Pa. 164 clearly shows that petitioner is in error when it makes the flat statement, on p. 3 of its Brief, that the plaintiff's claim therein sued upon "was never considered on the merits". In the previous action in the same trial court on the same claim, plaintiff had been nonsuited and had moved the court to remove the nonsuit, and the trial court *en banc,* in passing upon that motion, had presumptively reviewed plaintiff's evidence as on a demurrer thereto by defendant. So held the Supreme Court. Consequently, the judgment refusing to remove the nonsuit was one entered after a consideration of the merits of plaintiff's case as presented in evidence. Not having been appealed, that judgment became conclusive and made the facts involved *res judicata.* Thus, petitioner evidences a misunderstanding of this cited case also.

(c) Petitioner cites the *Sholter* case, 325 Pa. 48, the *Werner* case, 310 Pa. 120, and the *Maloney* case, 308 Pa. 251, as examples of what the Supreme Court of Pennsylvania does when it wants "to avoid the effect of *res judicata*". Just how petitioner arrives at any such conclusion is incomprehensible. Not one of these cases exemplifies anything of the kind. They do exemplify the usual practice of that Court when, as happened in each of the cited cases, the issues in a case at its bar had become moot *after the appeal was taken.* In such cases, the Supreme Court simply dismisses the appeal.

At p. 8, *supra,* we pointed out why the Supreme Court *affirmed the appealed decree* in the *Bassett* case and why the *appeal was dismissed* by that Court. Petitioner stubbornly refuses to under-

stand those actions by that Court. But the Circuit Court below understood them perfectly. The affirmance of the appealed decree *does not* control the instant case as *res judicata*. It simply approved the action of the court *en banc* below in dismissing the bill because the issues tendered had become moot while the case was in *that court*.

(5) Petitioner's laborious argument regarding the reference by the Court below to *A.L.I. Restatement of the Law of Judgments*, § 69 (2), is altogether pointless. It disregards entirely what is said in that eminently respectable authority under Comment (d):

"d. *Where a matter has become moot.* Where a judgment has been rendered against a party by a court of first instance, and on his appeal the appellate court refuses to review the proceedings because the controversy has become moot, the judgment is not binding in a subsequent action between the parties based upon a different cause of action.

Illustration:

1. A brings a mandamus proceedings against B, a public official who has removed A from a public office for alleged misconduct of A, seeking reinstatement. After a trial of the question whether A was guilty of such misconduct as to justify his removal from office, the court finds that he was guilty and gives judgment for the defendant. A appeals from the judgment, but before the appeal is heard his term of office expires, and the court dismisses the appeal on the ground that the controversy has become moot. Thereafter A sues B for damages for wrongfully removing him from office. The judgment in the prior action is not con-

clusive on the question whether A was guilty of such misconduct as to justify his removal."

The foregoing Comment and Illustration are directly applicable to the stage in the *Bassett* case proceedings when the decision of the chancellor was before the court *en banc*. The chancellor was the "court of first instance", and the court *en banc* was "the appellate court". The latter's refusal to review the chancellor's decision was "because the controversy has become moot". Petitioner simply fails to observe the precise analogy of the situation to that of the Comment and Illustration. Consequently, petitioner does not recognize the clear applicability of said § 69 (2) of the *Restatement*.

Petitioner's argument points to no Pennsylvania decision whatsoever in conflict with said § 69 (2) of the *Restatement* or with said *Comment (d)* thereto appended. Instead, petitioner contents itself by saying that said § 69 (2) "is patently not applicable here" and by proceeding with its labored argument in utter disregard of the relevant *comment* and *illustration* above quoted. Consequently, petitioner never even reaches its burden to show that the decision of Court below is in conflict with applicable Pennsylvania decisions so far as § 69 (2) of the *Restatement* is concerned.

(6) Wherefore, we submit that, as applied to the *first question* presented by the pending petition, the reason relied upon for allowance of the writ fails to move the discretionary power of this Court to grant certiorari for a review of that question.

III.

As applied to the second question presented, the reason relied upon is equally unsubstantiated.

(1) The Court below was entirely justified in refusing petitioner's application for rehearing as regards the point raised in its brief to the effect that the appealed judgment *n.o.v.* is supportable upon the extrinsic ground that respondent had failed to comply with § 49 of the Sales Act. In so refusing, the Court below made no ruling in conflict with applicable Pennsylvania decisions, as will now be shown.

(2) Section 49 of the Sales Act operates upon *contracts of sale.* It *does not* operate upon the *bond in suit.* This bond is conditioned for *performance of the contract.* It is not a bond of *indemnity against damages* suffered by *breach* of the contract. It was concerned only with the duty of petitioner's principal to *perform* its sales-contract and contemplated but two situations, —the performance or non-performance of that duty: *Mechanics Trust Co. v. Fid. & Cas. Co.,* 304 Pa. 526, 534. The condition of the bond is performance of a specific thing, and the only alternative for performance is the bond itself: *Purdy v. Massey,* 306 Pa. 288, 294. By becoming surety on this bond, petitioner is bound by its terms and cannot seek refuge in its principal's conditional liability as a seller under § 49 of the Sales Act, a liability which is totally immaterial to the obligation of this bond. The liability of a surety to an obligee is governed solely by the terms of the bond establishing privity between them: *Mechanics Trust Co. v. Fid. & Cas. Co., supra.* A right to notice of default of the obli-

gation of a bond is founded upon a special provision therefor in the bond and does not attach to the bond in the absence of such a provision: *School Dist. v. Lewis et al,* 101 Pa. Superior Ct. 583. The bond in suit contains no such provision.

Consequently, petitioner's liability upon the bond in suit is not predicated upon notice to petitioner's principal under § 49 of the Sales Act. When, at petitioner's insistence and over respondent's protest, the trial court required respondent to "produce evidence of such notice as has been given to the principal or surety in this case" (R.353), the trial court committed plain error fortunately cured by the verdict.

(3) Upon the record in this case, petitioner's point *was not raisable* in the Court below as *one of law* in support of the appealed judgment. Had petitioner considered the question as one of law, it *could* and *should* have raised the point by a motion in the trial court for a directed verdict based upon that specific ground. Instead, however, petitioner chose to consider the question as *one of fact* and presented its requests (10), (11), (12), and (13), all of which were affirmed and read into the charge of the trial court (R. 1785). Having thus made its bed, petitioner must lie in it.

(4) Petitioner's "vain act" argument *is not available* to it for the advanced purpose of justifying the appealed judgment. That argument is founded upon a contention of error in the charge of the trial court and in the admission of incidental evidence giving rise to the charge. But the propriety of entering a judgment *n.o.v.* is determinable by *the state of the record at the close of the trial* without any consideration of alleged

errors pertaining to evidence or the charge: *Kotlikoff v. Master,* 345 Pa. 258, 265; *Murphy v. Wolverine,* 155 Pa. Superior Ct. 125, 130; *Heffron v. Prudential Ins. Co.,* 137 Pa. Superior Ct. 69, 72.

(5) Regardless of petitioner's "vain act" argument (which, in any event, could have application *only* to such notices as were *not given*), any question of respondent's sufficient compliance with § 49 of the Sales Act was one peculiarly for the jury and is not determinable as a matter of law.

If all breaches of which no specific notice was given were eliminated from the case, the fact remains that some notices *were given.* That of June 16, 1932, gave notice of a number of breaches, including the very important one relating to the endorsed candidate mechanism (R. 1842). That of December 13, 1932, notified as to breaches concerning secrecy in the conduct of voting, multiple voting, inability of the voter to change his vote, inaccuracy in the recording and registering of votes, etc., (R. 1842). That of March 4, 1933, invited participation in the preparation for correction of defects (R. 1843). That of July 2, 1934, gave notice of the fact that the machines were then undergoing alterations and repairs to make them conform to the requirements of the contract (R. 1844).

When the principal amount of the verdict ($200,000) is compared with the total amount of damages proved (over $850,000), it is at once apparent that the verdict could easily have rested upon the actually given notices alone. Who is to say that it did not? That there is sufficient evidence to sustain such a finding is not open to question.

(6) It remains only to add that petitioner is in no position to advance its argument for its own benefit. Petitioner itself received each of the above mentioned notices. It chose of its own volition not only to disregard them entirely but also to deny expressly, by its own letters, any liability whatsoever in spite of them.

IV.

The questions presented are not solely decisive of the rectitude of the order below in reversal of the appealed judgment.

As shown in our "Counter-Statement of the Matter Involved" (see p. 3, *supra*), the decision of the Court below was based upon consideration of only *one* of *five grounds* of respondent's attack upon the appealed judgment *n.o.v.* Its order of reversal (A.P. 58) is a *general* one. No review of that order would be complete without a consideration of the other *four grounds* upon which respondent attacked the appealed judgment. Hence, the questions presented by the pending petition are not *solely* decisive of the rectitude of that order. Consequently, this Court should not grant certiorari for consideration of the questions presented.

V.

Conclusion: The petition should be denied.

Upon the foregoing argument in opposition to the petition, respondent respectfully contends that the petition should be denied.

Respectfully submitted,

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